48

No. 06-907

Supreme Court, U.S.
FILED
MAR 6 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

COUNTY BANK OF REHOBOTH BEACH, DELAWARE AND MAIN STREET SERVICE CORPORATION,

Petitioners,

v.

JALIYAH MUHAMMAD, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

F. PAUL BLAND, JR.
Counsel of Record
PUBLIC JUSTICE, P.C.
1825 K Street, Suite 200
Washington, DC 20006
(202) 797-8600

DONNA SIEGEL MOFFA
TRUJILLO, RODRIGUEZ & RICHARDS
8 Kings Highway West
Haddonfield, NJ 08033
(856) 795-9002

MICHAEL J. QUIRK
MARK R. CUKER
WILLIAMS CUKER BEREZOFSKY
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002
(856) 667-0500

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. The Underlying Transactions and State Law Claims	2
B. The New Jersey Supreme Court's Decision	5
REASONS FOR DENYING THE PETITION	7
I. The Court Lacks Jurisdiction Over This Interlocutory State Court Order Compelling Arbitration	7
A. The Decision Below Is Not a Final Judgment Under 28 U.S.C. § 1257(a)	7
B. The *Cox Broadcasting* Exceptions to § 1257's Final Judgment Rule Do Not Apply	9
II. The Federal Arbitration Act Preemption Issue Raised in the Petition Does Not Merit Review	11
A. There Is No Split of Authority on Petitioners' FAA Preemption Argument	11
B. The Decision Below Does Not Conflict With This Court's Decisions	16
1. The Petition's Principal Argument Is Contrary to This Court's Decisions Applying the FAA	16
2. This Court's Decision in *Bazzle* Demonstrates That the Decision Below Was Correct	17

TABLE OF CONTENTS – Continued

Page

3. The Decision Below Is Consistent With This Court's Decision in *Gilmer* 19

4. Petitioners' Theory Is Contrary to Cases Addressing Implied Conflict Preemption 20

C. Petitioners' Policy Arguments Are Unpersuasive 21

III. The Petition's Second and Third Questions Presented Likewise Do Not Merit Review 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 24

Allen v. Marshall Field & Co., 93 F.R.D. 438 (N.D. Ill. 1982) 20

Allied-Bruce Terminix Co's, Inc. v. Dobson, 513 U.S. 265 (1995) 21

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 23

Bess v. DirecTV, Inc., 815 N.E.2d 455 (Ill. App. 2004) 18

Best & Co., Inc. v. Maxwell, 311 U.S. 454 (1940) 26

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 24

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 25

Caley v. Gulstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005) 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2, 9, 10, 11

Delta Funding Corp. v. Harris, 912 A.2d 104 (N.J. 2006) 13

Delta Funding Corp. v. Harris, 466 F.3d 273 (3d Cir. 2006) 14

Doctor's Assoc's, Inc. v. Casarotto, 517 U.S. 681 (1996) 16, 21

EEOC v. Waffle House Corp., 534 U.S. 279 (2002) 22

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 21

TABLE OF AUTHORITIES – Continued

Page

Garcia v. DirecTV, Inc., 9 Cal. Rptr. 3d 190 (Cal. App. 2004) 18

Genus Credit Management Corp. v. Jones, 2006 WL 905936 (D. Md. April 6, 2006) 18

Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*

Gras v. Associates First Capital Co., 786 A.2d 886 (N.J. App. Div. 2001) 6

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003) ..... *passim*

Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) 22

Healy v. The Beer Institute, 491 U.S. 324 (1989) 26

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004) 14, 15

Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) 15

In re Wood, 140 S.W.3d 367 (Tex. 2004) 18

Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997) 7, 8

Johnson v. W. Suburban Bank, 225 F.3d 366 (3d Cir. 2000) 12, 13

McCarthy v. NASCAR, Inc., 226 A.2d 713 (1967) 6

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 16

Pedcor Mgmt. Co. v. Nat'l Personnel of Texas, 343 F.3d 355 (5th Cir. 2003) 18

Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351 (Tenn. Ct. App. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8, 24

Ramirez v. Cintas Corp., 2005 WL 659984 (N.D. Cal. Mar. 22, 2005) 18

Randolph v. Green Tree, 244 F.3d 814 (11th Cir. 2001) 13

Rudbart v. North Jersey Dist. Water Supply Comm'n, 605 A.2d 681 (N.J. 1992) 5, 6, 25

Schultz v. AT&T Wireless Servs., Inc., 376 F. Supp.2d 685 (N.D. W. Va. 2005) 12

Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002) 15

Southland Corp. v. Keating, 465 U.S. 1 (1984) 10

State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002) 19

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003) 15

UNUM Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999) 23

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 25

Veliz v. Cintas Corp., 2005 WL 1048699 (N.D. Cal. May 4, 2005) 18

Volt Info. Sciences, Inc. v. Bd. of Trustees of Stanford Univ., 489 U.S. 468 (1989) 20, 21

Walther v. Sovereign Bank, 872 A.2d 735 (Md. 2005) 15

Wein v. Morris, 909 A.2d 1186 (N.J. Super. App. Div. 2006) 8

Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004) 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

9 U.S.C. § 2 ..... *passim*

9 U.S.C. § 16(b) 8

28 U.S.C. § 1257(a) ..... *passim*

28 U.S.C. § 1292(b) 8

La. Rev. Stat. Ann. § 51:1409(A) 15

NJSA § 31:1-1(a) 3

NJSA § 2A:23B-28(a)(3) 10

NJSA § 2C:21-19 3

OTHER AUTHORITY

American Arbitration Association, "Class Arbitration Case Docket" (available at www.adr.org/Classarbitrationpolicy) 18

Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301 (2004) 18

Federal Rule of Civil Procedure 23(b) 23

Office of Comptroller of Currency News Release 2003-06 (Jan. 31, 2003) 3

INTRODUCTION

The decision below favors arbitration by prohibiting exculpatory contract terms that prevent arbitration from ever occurring. This Petition arises from a state court order *compelling the parties to arbitrate*. What Petitioners are now seeking is not the right to arbitrate, which they already have, but a right to compel arbitration under rules that unduly favor them by preventing Respondents from vindicating their state-law claims. No one disputes that federal law gives Petitioners and other companies a general right to enforce contracts for arbitration. But this is not an unlimited right that forces courts to rubber-stamp any arbitration terms a company can devise. Instead, the Federal Arbitration Act ("FAA") makes arbitration clauses revocable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Because the plaintiffs' claims here are quite complex, but small in value, the New Jersey Supreme Court held that the Petitioners' contract term banning class actions was effectively an illegal exculpatory clause. Because a longstanding body of generally applicable New Jersey contract law arising in settings that have nothing to do with arbitration holds that exculpatory contract terms are unenforceable, the New Jersey Supreme Court struck that term as unenforceable before ordering the parties to arbitrate. The issue here thus is not whether arbitration is *ever* allowed, but whether federal law overrides generally applicable New Jersey contract law prohibiting exculpatory terms in contracts of adhesion merely because those terms are embedded in an arbitration clause. For each of the following reasons, the New Jersey Supreme Court's resolution of this question does not warrant review.

As a preliminary matter, the Petition should be rejected because this Court does not have jurisdiction. The ruling below compelling the parties to arbitrate is not a final judgment under 28 U.S.C. § 1257(a), and this case does not fall within any of the four exceptions to the final judgment rule recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Even if the Court did have jurisdiction, it still should not grant the Petition. The Petition raises three issues. The first issue poses a theory of federal law that has never been adopted by any state high court or federal appellate court. The second and third issues posed in the Petition were not timely raised in the state courts below, present no split of authority, and also are wholly lacking in merit. For all of these reasons, the Petition should be denied.

STATEMENT OF THE CASE

A. The Underlying Transactions And State Law Claims

Plaintiff Jaliyah Muhammad was a part-time student at a business school when she took out her first payday loan to pay for her school books. On May 26, 2003, Ms. Muhammad obtained a $200 payday loan from the defendants in exchange for a loan note requiring a lump sum payment of $260 (including a $60 finance charge) by June 13. This amounts to an interest rate of 608.33%. When she could not repay this balance, she twice paid additional $60 charges to extend the same $200 principal. In total, she paid $180 interest on a $200 loan she had for under two months.

Although Ms. Muhammad's loan papers listed County Bank as the lender, Ms. Muhammad alleges that the actual lender was Easy Cash, which marketed these loans to New Jersey consumers through the mass media and over the Internet. After the consumer signs a loan form and transmits it to Easy Cash by telephone, fax, or over the Internet, Easy Cash arranges to transfer funds to the consumer's checking account.

Ms. Muhammad filed a putative class action in State court claiming that these loans violated New Jersey's civil usury limit of 16% APR (NJSA § 31:1-1(a)), as well as its criminal usury limit of 30% APR (NJSA § 2C:21-19). She alleged that Easy Cash conspired to evade New Jersey's usury laws by naming County Bank as the lender when, *in fact*, it was the Easy Cash defendants who financed, marketed, originated, and serviced these loans, and bore all of the risk through an agreement to indemnify County Bank. This sort of arrangement is often referred to as a "rent a bank" scheme, and has been sharply criticized by federal regulators (among others). *See*, *e.g.*, Office of Comptroller of Currency News Release 2003-06 (Jan. 31, 2003) ("We have been greatly concerned with arrangements in which national banks essentially rent out their charter to third parties who want to evade state and local consumer protection laws.") Plaintiff claimed that this enterprise violated New Jersey's Consumer Fraud Act ("CFA") and its RICO statute's prohibition against criminal usury racketeering. Ms. Muhammad also charged that County Bank's involvement in this enterprise violated the CFA's and State RICO statute's separate prohibitions against aiding and abetting usury.

Petitioners responded to Ms. Muhammad's lawsuit first by removing the case to federal court based on a

"complete preemption" argument. Pet. A17. After this argument failed and the case was remanded, Petitioners next moved the State court to bar Ms. Muhammad's class claims and compel her to arbitrate an individual action. In support of this motion, Petitioners invoked a mandatory arbitration clause in their payday loan contracts. The primary operative sentence of Petitioners' arbitration clause is 157 words long. In addition to requiring arbitration, this clause barred Petitioners' customers from bringing or participating in class actions. The clause also incorporated the rules of procedure of the National Arbitration Forum ("NAF"). One of those rules limited the discovery available to parties to an amount commensurate with the value of their claims. Under this rule, if Ms. Muhammad were required to proceed on an individual basis, she would only be permitted to take discovery commensurate with her $180 damages claim in support of her allegation that the whole rent-a-bank structure was a sham to conceal who the true lender was.[1] The NAF's rules also included a "loser pays" term, which permits arbitrators to force any consumer who does not prevail on her claims to pay the defendant's attorney fees and arbitration costs.

Ms. Muhammad opposed Petitioners' motion on the grounds that the arbitration clause is unconscionable under New Jersey law in light of its adhesive and exculpatory terms. Under established New Jersey law, a

[1] Proving this allegation is essential to hers and the class members' claims because, absent such proof, a finding that County Bank is the lender defeats her claims under a federal preemption doctrine that allows a Delaware bank to make loans in New Jersey while ignoring its laws governing interest rates.

non-negotiable adhesive contract provision is unconscionable if there is a disparity in sophistication and bargaining power between the parties *and* the provision's terms are either exculpatory or unreasonably one-sided in favor of the drafter. *See Rudbart v. North Jersey District Water Supply Comm'n*, 605 A.2d 681 (N.J. 1992). With respect to the first prongs of this argument, the record contained copies of the arbitration clauses of all of the defendants' competitors, establishing that clauses banning class actions and using NAF are pervasive in the payday lending industry. The record also established that Petitioners' mandatory arbitration clause is a non-negotiable, adhesive provision imposed by experienced lending companies against payday loan borrowers with limited commercial experience and credit options. The arbitration clause is a pre-printed, standard form provision, transmitted between borrower and lender by facsimile with no opportunity for negotiation. With respect to the exculpatory and one-sided effect of the arbitration clause's terms, the record established that since County Bank began putting its name on payday loans nationwide in 1997, only two (2) customers have ever even attempted to arbitrate claims.

The State trial court rejected Ms. Muhammad's argument and held that the arbitration clause's terms prohibiting her class claims were enforceable. The New Jersey Superior Court, Appellate Division, affirmed.

B. The New Jersey Supreme Court's Decision

After granting Ms. Muhammad's petition for leave to file an interlocutory appeal, the New Jersey Supreme Court reversed in part by holding that the class arbitration ban was unconscionable, but severable, so that the

arbitration clause could still be enforced. The court began its discussion with a recognition of the federal policy favoring arbitration, Pet. A19, while noting this Court's decisions directing that the FAA does not preclude an examination into whether a given arbitration clause is unconscionable under state law. *Id.*

The New Jersey Supreme Court then addressed New Jersey's standard for finding unconscionability, a "multi-factor analysis" that had been developed in a series of cases none of which involved the enforcement of arbitration clauses. In particular, the court relied heavily upon the considerations set forth in its prior decision in *Rudbart*, *supra*. *E.g.,* Pet. A12, A22, A23, A25-A26. The court then noted the pivotal and longstanding rule that, "[i]n New Jersey, exculpatory waivers that seek a release from a statutorily imposed duty are void as against public policy. *McCarthy v. NASCAR, Inc.*, 226 A.2d 713 (1967)." Pet. A27. The court discussed prior New Jersey law, as well as decisions from this Court and numerous other courts, establishing that, in certain circumstances (particularly those involving small-value claims), the class action device offers the only means for individuals to effectively vindicate their rights. Pet. A26-A29. The court distinguished, but did not overrule, a prior decision by an intermediate appellate court in New Jersey, *Gras v. Associates First Capital Co.*, 786 A.2d 886 (N.J. App. Div. 2001). Pet. A29.

The court explained that its decision was consistent with New Jersey's policy favoring arbitration, because "[n]othing in the arbitration process requires that claims be brought only by individuals." Pet. A30. The court also noted the consistency between its decision and this Court's

statement that "arbitration is allowed in actions authorized by federal statutes '[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" Pet. A31, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). The Court pointedly added, twice, that it would have reached the same conclusion on unconscionability of the class action ban had it appeared with *or without* an arbitration clause. Pet. A12, A29.

The court then held that the provision banning class actions was severable from the remainder of the arbitration agreement, Pet. A33-A34, and thus ordered the parties to proceed to arbitration with that provision stricken. Pet. A34.

REASONS FOR DENYING THE PETITION

I. The Court Lacks Jurisdiction Over This Interlocutory State Court Order Compelling Arbitration.

A. The Decision Below Is Not a Final Judgment Under 28 U.S.C. § 1257(a).

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . " 28 U.S.C. § 1257(a). Section 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). This means that a state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein." *Id.* Section 1257's requirement of finality " 'is not one of those technicalities to be easily scorned. It is an important factor in

the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Here, since the New Jersey Supreme Court did not issue a final judgment or decree, this Court lacks jurisdiction under § 1257(a).

After finding County Bank's class-action ban unenforceable, the New Jersey Supreme Court held that the waivers were severable so that "the remainder of the arbitration agreement is enforceable." Pet. A33. In remanding the case to the state trial court "for proceedings consistent with this opinion" (Pet. A34), the New Jersey Supreme Court ordered the parties to arbitrate Ms. Muhammad's claims. This order thus is not final as an "effective determination of the litigation." *Jefferson*, 522 U.S. at 81.

Indeed, orders compelling arbitration without dismissing claims are not final or appealable as of right under either federal or New Jersey law. *See* 9 U.S.C. § 16(b) (except under the permissive appeal provisions of 28 U.S.C. § 1292(b), appeal may not be taken from an "interlocutory" order directing arbitration or staying litigation in favor of arbitration); *Wein v. Morris*, 909 A.2d 1186, 1194 (N.J. Super. App. Div. 2006) ("A stay of an action pending arbitration does not constitute a final, appealable order because it inherently anticipates further proceedings prior to the ultimate entry of a final judgment."); *see also id.* n.6 (noting that subsequently enacted N.J. Uniform Arbitration Act "does not appear to expressly permit an appeal from an order staying an action and compelling arbitration.").[2] The decision below compelling arbitration thus is not a final judgment under § 1257(a).

---

[2] In the proceedings below, Ms. Muhammad did not have an appeal of right to the New Jersey Supreme Court. Instead, she had to obtain

(Continued on following page)

B. The *Cox Broadcasting* Exceptions to § 1257's Final Judgment Rule Do Not Apply.

Under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court may review state court decisions prior to a final judgment in four narrow circumstances. The first involves cases where "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. Second are cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Third are cases where "the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The fourth exception arises where (a) "the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; *and* (b) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-83. None of these exceptions to § 1257(a)'s final-judgment rule applies here.

The first three *Cox Broadcasting* exceptions do not apply because all claims and defenses on the merits are yet to be resolved, and thus could be subject to later appeals. This is not a case where "the federal issue is

---

leave for an interlocutory appeal. *See* Pet. A18, B19. New Jersey law does not have an equivalent to 28 U.S.C. § 1257(a) requiring a final judgment for all appeals.

conclusive" in further proceedings or the outcome of these proceedings is "preordained," 420 U.S. at 479, because either party could still prevail on its unresolved merits claims or defenses. The first exception thus does not apply. Nor does the second exception apply because, if Muhammad fails to prove her state-law claims or County Bank prevails on a merits defense, the federal question asserted here would not "survive and require decision." *Id.* at 480. Likewise, the third exception does not apply because there is no state-law bar to a later appeal by any party, *id.* at 481, in the event of an adverse judgment. To the contrary, New Jersey law expressly recognizes a party's right to an appeal after arbitration proceedings are completed. *See* NJSA § 2A:23B-28(a)(3) ("An appeal may be taken from an order confirming or denying confirmation of an [arbitral] award.").

Finally, the fourth *Cox Broadcasting* exception likewise does not apply here for two independent reasons. First, a reversal of the decision below on the federal issue asserted would not as a matter of law "be preclusive of any further litigation on the relevant cause of action," 420 U.S. at 482-83, since Ms. Muhammad would retain her individual state-law claims, whether or not she could effectively vindicate them. Thus, the Petition fails to meet the fourth exception. Moreover, this is not a case where "a refusal to review the state-court decision might seriously erode federal policy." *Id.* at 483. The Court has applied this exception to allow interlocutory appeals from state court orders *denying* arbitration, finding that "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate." *Southland Corp. v. Keating*, 465 U.S. 1, 7-8

(1984). The decision below, however, *compelled* arbitration of Ms. Muhammad's claims. Thus, a refusal to grant immediate review here that allows the parties to arbitrate would not erode federal policy favoring arbitration. For each of these reasons, the New Jersey Supreme Court's decision does not fall within *Cox Broadcasting*'s fourth exception.

In sum, this case presents no basis to depart from § 1257(a)'s imposition of a "firm final judgment rule." The Court thus lacks jurisdiction, and the petition should be denied.

II. The Federal Arbitration Act Preemption Issue Raised in the Petition Does Not Merit Review.

A. There Is No Split of Authority on Petitioners' FAA Preemption Argument.

As set forth above, in this case, the New Jersey Supreme Court held that Petitioners' contract provision banning class actions was unconscionable, because under the facts of this case (involving very complicated and difficult-to-prove, but individually small claims), it would serve as an exculpatory clause and exculpatory clauses embedded in contracts of adhesion are unconscionable under New Jersey contract law. The Petition argues that even if a contractual provision banning consumers from bringing or participating in a class action is unconscionable under normal state doctrines of contract law, this body of state law is nonetheless preempted by the FAA. *E.g.*, Pet. 19. The Court below rejected Petitioners' argument that the FAA preempts normal state principles of contract law. To establish a conflict between the decision of the New Jersey Supreme Court and other state high

courts or federal appellate courts, Petitioners must identify *some* such court holding that even though a contract term banning class actions embedded in an arbitration clause is unconscionable under state law, that rule of state law is nonetheless preempted by the FAA. Petitioners do not cite to any such case, and there is none.[3] There are courts that have enforced class action bans in given cases, but each was decided on grounds unrelated to the federal legal theory advanced in the petition. In sum, Petitioners never identify a split of appellate authority on the federal law question raised in the Petition.[4]

Instead, Petitioners point to inapposite cases to generate the appearance of a conflict. For example, the Petition alleges a conflict between the lower court here and a number of cases where courts have held that the language and legislative history of certain other federal statutes do not conflict with the FAA. *E.g.*, Pet. at 4, 17 (citing *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000)). The Petition claims that the decision below represents a split with *Johnson* that would result in the

---

[3] The closest Petitioners come (Pet. 14-16) is a case from a Tennessee intermediate appellate court, *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001), and a case from a federal trial court in West Virginia. *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp.2d 685, 691 (N.D. W. Va. 2005)). *Pyburn* does not represent the view of a state court of last resort, *see* S. Ct. Rule 10, and in any event held that a class action ban at issue was not unconscionable *under state law*. Accordingly, *Pyburn*'s preemption discussion was unnecessary to its holding and thus is pure dicta.

[4] The Petition blurs this fact through the use of vague language. It states, for example, that "[t]he question divides" state and federal courts, Pet. at 12, but does not say *which* question divides those courts. As will be shown, none of the cases cited support the proposition that the question of federal law advanced in the opinion divides those courts.

law being different in federal courts in New Jersey and in New Jersey state courts. Pet. at 17. But *Johnson* does not conflict with the opinion below because it did not hold that state law relating to a class action ban was preempted by the FAA. Instead, *Johnson*'s holding allowing enforcement of an arbitration clause's class-action prohibition turns upon the language and legislative history of the federal Truth in Lending Act ("TILA").[5] This case says nothing about the FAA's relationship to state contract law.[6]

In fact, the Third Circuit – in sharp contrast to Petitioners' approach – holds that the question of the unconscionability of an arbitration clause term banning class claims is one of state, not federal, law. Petitioners repeatedly cite to the New Jersey Supreme Court's decision in *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006) for its policy arguments, but that case was certified to the state court *by the Third Circuit*, *id.* at 108, for a determination of whether provisions in a mandatory consumer arbitration clause, including its class action waiver, *id.* at 115, were unconscionable under New Jersey law. The Third Circuit's certification and subsequent embrace of the

---

[5] The proper interpretation of TILA was also the issue in *Randolph v. Green Tree*, 244 F.3d 814 (11th Cir. 2001), Pet. at 4, and thus that case also does not pose a conflict on the federal law issue presented in this Petition.

[6] That *Johnson*'s holding is based on unique considerations relating to TILA claims is demonstrated by the Third Circuit's subsequent finding in a case involving claims under the Fair Debt Collection Practices Act ("FDCPA") that class actions appear to be fundamental to the statutory structure of the FDCPA, so that "lacking this procedural mechanism meritorious FDCPA claims might go unaddressed because *the awards in an individual case might be too small to prosecute an individual action.*" *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004) (emphasis added).

New Jersey Supreme Court's opinion applying state contract law, *see Delta Funding Corp. v. Harris*, 466 F.3d 273 (3d Cir. 2006), demonstrate that the Third Circuit squarely rejects the federal preemption theory Petitioners espouse here.

Likewise, Petitioners cannot manufacture a split by pointing to cases where the general contract laws of states other than New Jersey do not consider class action bans to be exculpatory. *See* Pet. at 15 (acknowledging that various state court holdings enforcing class action bans are based upon state unconscionability law). This Court does not sit to resolve differences among the states relating to their contract law doctrines governing exculpatory clauses. This is particularly so under the FAA, whose savings clause calling for the application of state contract law principles to arbitration clauses makes the existence of such differences in result inevitable.

In one example of this confusion of state and federal law, the Petition mis-cites *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), to allege the existence of a split justifying this Court's review of the FAA question presented here. Pet. at 16. In fact, the difference between the holding in *Iberia* and the holding of the New Jersey Supreme Court this case is based entirely on a difference in state law. The two cases are entirely consistent on the *federal* law issue raised in the Petition. The reason the Fifth Circuit upheld the class action ban at issue in *Iberia* was because there is no general Louisiana policy in favor of class actions in consumer litigation. In making its unconscionability determination, the court noted that the Louisiana Unfair Trade Practices Act (LUTPA) does not permit class actions, and that Louisiana law recognizes alternative remedies to class actions. 379

F.3d at 174-75 (citing La. Rev. Stat. Ann. § 51:1409(A)). *Iberia* acknowledged that the enforceability of a class action ban is a question of state law, distinguishing (rather than disagreeing with) a Ninth Circuit case that held that an arbitration clause barring class actions was unconscionable under California law on the grounds of the difference in state law between California and Louisiana. 379 F.3d at 174 (citing *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003)).

The same is true of *Caley v. Gulstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (cited at Pet. 16), where the court upheld a class action ban based upon its reading of Georgia state contract law. 428 F.3d at 1379. The court did not even mention preemption, and like *Iberia* distinguished (rather than disagreed with) a Ninth Circuit case applying the different contract law of California. *Id.* at 1378 (distinguishing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003)).

Similarly, the Petition asserts a conflict with *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002). Pet. 4, 17. As with *Iberia*, *Caley*, and numerous other cases cited in the Petition, *Snowden* does not conflict with the decision below on any issue of federal law, however, but merely reflects that Maryland's state law of exculpatory clauses differs from the law in New Jersey. *See, e.g.*, *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005).

In sum, these cases are only in conflict with the decision below in the sense that the contract laws of New Jersey, Louisiana, Maryland and Georgia differ. There is no split of authority on the federal law question presented. For this reason alone, the Petition should be denied.

B. The Decision Below Does Not Conflict With This Court's Decisions.

1. The Petition's Principal Argument Is Contrary to this Court's Decisions Applying the FAA.

The Petition repeatedly argues that arbitration agreements must always be enforced in their entirety, precisely as written, without any interference with state law. *E.g.*, Pet. at 19. This argument ignores the FAA's savings clause, and this Court's decisions interpreting it.

As the Court below established at some length, New Jersey law disfavoring adhesive exculpatory contracts is part of the State's general law of unconscionability and public policy governing *all* contracts. Under this Court's decisions applying the FAA, this general contract law applies to arbitration clauses just as it does to any other contract term. *See Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C. § 2]."); *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)) (internal quotation omitted).

2. This Court's Decision in *Bazzle* Demonstrates that the Decision Below Was Correct.

Petitioners argue that this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) should be read as holding that courts may not "vary" from contract terms with respect to bans on class actions if those terms are embedded in arbitration clauses. Pet. at 5 (citing to a dissent in *Bazzle*). In fact, nothing in *Bazzle* supports Petitioners' argument – *Bazzle* did not involve an unconscionability challenge to a class action ban and did not involve the FAA's savings clause.

In fact, *Bazzle* disproves one of Petitioners' central assumptions: that a contract term banning class actions is inherently part of any agreement to arbitrate. The Petition argues, for example, that if the decision below (which enforced the agreement to arbitrate but struck the class action ban) is enforced, that all businesses will have to fear that "their arbitration agreements" will all be invalidated. Pet. at 18. In Petitioners' world, class action bans are inseparable from arbitration clauses. *See also* Pet. at 4 (asserting that courts may never order class-wide arbitration unless parties have expressly agreed to that proceeding, the same theory as was unsuccessfully advanced in *Bazzle*).

This theory was rejected by six Justices of this Court in *Bazzle*. In *Bazzle*, the plurality held that, where an arbitration clause does not explicitly allow the arbitrator to proceed on a class basis, the question of whether the arbitration may proceed on that basis is "a matter of state law." 539 U.S. at 447. Two other Justices would have left undisturbed the decision of the South Carolina Supreme Court, which – contrary to Petitioners' proposed rule of

federal law – permitted class-wide arbitration. Although Petitioners continue to insist that class actions are inherently inconsistent with arbitration, courts throughout the United States applying *Bazzle* in the last several years have rejected similar arguments and instead have held that cases could proceed in arbitration on a class action basis in cases where the arbitration clauses did not expressly authorize class action treatment.[7]

As further proof that class actions are not inconsistent with arbitration, shortly after this Court issued its decision in *Bazzle*, the American Arbitration Association ("AAA") adopted a new set of rules for handling class actions in arbitration. *E.g.*, Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301 (2004) ("The AAA promulgated the first set of classwide arbitration rules in October 2003, following the *Bazzle* decision."). As of this writing, AAA lists over 100 cases being heard under its "Supplementary Rules for Class Arbitrations." *See* American Arbitration Association, "Class Arbitration Case Docket" (available at www.adr.org/Classarbitration policy). Under Petitioners' theory, the American Arbitration Association has been actively undercutting the FAA for the past three years since *Bazzle* was decided.

---

[7] *See, e.g., Pedcor Mgmt. Co. v. Nat'l Personnel of Texas*, 343 F.3d 355 (5th Cir. 2003); *Genus Credit Management Corp. v. Jones*, 2006 WL 905936 (D. Md. April 6, 2006); *Veliz v. Cintas Corp.*, 2005 WL 1048699 at *5 (N.D. Cal. May 4, 2005); *Ramirez v. Cintas Corp.*, 2005 WL 659984 at *10-11 (N.D. Cal. Mar. 22, 2005); *In re Wood*, 140 S.W.3d 367 (Tex. 2004); *Bess v. DirecTV, Inc.*, 815 N.E.2d 455, 460 (Ill. App. 2004); and *Garcia v. DirecTV, Inc.*, 9 Cal. Rptr. 3d 190, 195-96 (Cal. App. 2004).

Accordingly, after *Bazzle*, there is no reason why a decision finding that a class action ban is unconscionable even implicates the FAA. A contract can include a class action ban without including an arbitration provision, or a contract could include an arbitration agreement without a class action ban. The FAA does not allow a party to evade state contract law "merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration." *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002). Nothing in the FAA permits parties to launder otherwise illegal contract terms and make them legal merely by placing them under the heading "arbitration."

3. The Decision Below Is Consistent With This Court's Decision in *Gilmer*.

Petitioners also argue that this Court held that arbitration clauses are enforceable even where they do not provide for class actions, citing to this Court's decision in *Gilmer*. Pet. at 5. This argument misreads *Gilmer*. First, unlike the arbitration clause at issue here, the clause in *Gilmer* allowed for class arbitrations. 500 U.S. at 32 (noting that collective relief could be obtained in arbitration). Therefore, unlike the plaintiffs here, the *Gilmer* plaintiff would not be deprived of a class remedy if arbitration were compelled on the terms set forth in the contract. Second, *Gilmer* was not a class action, but an individual civil rights action seeking damages substantially greater than the damages sought here. Thus, the availability of a class action was not necessary for the *Gilmer* plaintiff to obtain relief.

In addition, in *Gilmer*, the Court was interpreting the text and structure of the federal Age Discrimination in Employment Act, not a state law challenge to an arbitration clause such as those permitted under § 2 of the Federal Arbitration Act. The case contains no discussion of state law dealing with exculpatory clauses (or any other topic of state law). Moreover, in *Gilmer* there was no reason to imagine that a class action ban would prevent the plaintiff from effectively vindicating his substantive rights. Indeed, Congress was evidently aware that ADEA claims (typically claims that a person at the peak of her earning power was wrongfully terminated) are unlike small consumer claims, and that class actions are generally not necessary to provide a remedy to such plaintiffs. This is demonstrated in part by the fact that class actions under the ADEA proceed on an opt-in basis rather than the normal opt-out process such as that under Rule 23(b)(3). *See, e.g., Allen v. Marshall Field & Co.,* 93 F.R.D. 438 (N.D. Ill. 1982).

4. Petitioners' Theory Is Contrary to Cases Addressing Implied Conflict Preemption.

The decision below is also consistent with this Court's jurisprudence involving the doctrine of implied conflict preemption. As this Court has made clear in a variety of contexts, a federal law does not impliedly preempt a body of state law where the federal law *says nothing about this subject*. Here, the FAA has no express preemption provision and does not reflect Congress's intent to occupy the entire field of arbitration or contract law. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Stanford Univ.*, 489 U.S. 468, 477 (1989). Instead, the FAA preempts state laws only

if they conflict with the Act's underlying purposes. *Id.* at 477-78. Thus, the FAA preempts state laws singling out arbitration clauses for disfavored treatment because they conflict with the Act's goal of putting these clauses on the same footing as other contracts.[8]

The New Jersey unconscionability and public policy principles applied by the lower Court here address *not* the choice of an arbitral or judicial forum, but the exculpatory rules Petitioners imposed in requiring arbitration. As *Bazzle* demonstrates, the FAA nowhere addresses this subject. Where federal law is silent on a subject, there is no implied conflict preemption of state law based on frustration of federal policy.[9]

C. Petitioners' Policy Arguments Are Unpersuasive.

Petitioners argue for a one-size-fits-all rule of federal law that contract terms banning class actions are always enforceable, so long as they are embedded in an arbitration clause, without respect to the facts of a case or state law. Under Petitioners' view, state law is powerless to regulate such terms no matter how complex the individual claim, how small its value, or how impracticable it would be for individuals to vindicate their legal rights without

---

[8] *See, e.g., Casarotto*, 517 U.S. at 686-87 (FAA preempts state statute imposing extra disclosure requirements for arbitration clauses); *Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 280-81 (1995) (FAA preempts state law barring enforcement of all pre-dispute arbitration contracts).

[9] *Cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995) ("A finding of liability against petitioners would undermine no objectives or purposes with respect to ABS devices since none exist.").

the class action mechanism. Instead of having courts consider whether a class action ban is exculpatory and thus violates a particular state's generally applicable contract law, Petitioners demand that this Court enunciate a new sweeping rule of federal law that would protect their interests whether or not a given arbitration clause's terms are exculpatory *so that arbitration will never actually take place*. *See, e.g.*, Pet. 20 (arguing that FAA bars fact-based analyses of enforceability under state law).

Petitioners' argument ignores this Court's decisions stating that arbitration is acceptable as an alternative to the civil justice system only where it permits a party to "effectively vindicate" his or her statutory rights. *See, e.g., EEOC v. Waffle House Corp.*, 534 U.S. 279, 295 n.10 (2002); *Gilmer*, 500 U.S. at 28; *Mitsubishi*, 473 U.S. at 637. The Court has never said that an arbitration clause is always enforceable without respect to whether its terms allow for vindication of claims. To the contrary, in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 81 (2000), the Court found that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating [its] rights." In direct contrast to Petitioners' proposed approach, this Court in *Randolph* refused to hold that arbitration is always so cheap that it permits parties to vindicate their rights, or that it is never cheap enough to permit parties to vindicate their rights. Instead this Court required courts to conduct what Petitioners would call "*ad hoc*" fact specific determinations as to whether the costs of arbitration are too high or too low in particular cases.

Petitioners suggest that it is unworkable for courts to conduct a case-by-case determination as to whether a class action ban serves as an exculpatory clause that prevents

parties from "effectively vindicating" their rights in a given case, but this is precisely the kind of analysis that courts regularly conduct. To take the most obvious example, Federal Rule of Civil Procedure 23(b) provides that, for cases where damages predominate over injunctive relief, courts may only certify class actions if – on the facts of those cases – they find that a class action is superior to other methods of adjudicating the dispute. Accordingly, every day in this country, courts evaluate whether individual litigants would be better able (or able at all) to effectively vindicate their claims without the class action device. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

Finally, Petitioners' policy arguments are at odds with the FAA itself. As noted, this Court has repeatedly recognized that the FAA incorporates general principles of state contract law. This fact overrides Petitioners' desire for an all-federal FAA, where no variations are permitted between states with respect to contract law. Where, as here, a statute preserves a role for states, that reflects a congressional intent to accept some degree of disuniformity. *Cf. UNUM Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376 n.9 (1999) (disuniform state regulations "are the inevitable result of the congressional decision [in ERISA] to save local insurance regulation.").

In sum, none of Petitioners' arguments based on the FAA merit review.

III. The Petition's Second and Third Questions Likewise Do Not Merit Review.

Petitioners' second and third questions presented addressing the Due Process and Interstate Commerce Clauses are not worthy of review. First, these arguments are waived because neither was timely raised in the state court proceedings. Petitioners did not raise their Due Process Clause argument until they petitioned the New Jersey Supreme Court for rehearing (*see* Pet. F16-20), and did not raise their Interstate Commerce Clause argument until filing their Petition with this Court. In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the general rule that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). As the Court explained in *Adams*, "we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Id.* at 89.[10] Since this is precisely what Petitioners did in the state court proceedings with their Due Process question, and Petitioners *never* raised their Interstate Commerce Clause question below, these thirteenth-hour arguments come "too late for consideration here."

---

[10] *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal."); *Radio Station WOW*, 326 U.S. at 128 ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ").

Neither of these questions presents a basis for review in any event. In support of their argument that the decision below "denies Petitioners Due Process by retroactively enforcing a new interpretation of New Jersey law" (Pet. 23), Petitioners cite *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Bowen* held that federal Medicare regulations imposing retroactive cost limits were invalid because they were not authorized by statute, 488 U.S. at 215, while also *upholding* the agency's retroactive application of the rule *in adjudication* on a case-by-case basis. *Id.* at 209. *Turner Elkhorn* upheld a federal statute imposing retroactive liability upon coal mine operators for the death and disability benefits of their injured former workers. *See* 428 U.S. at 18 ("[T]he imposition of liability for the effect of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . ."). The decision below conflicts with neither of these cases because (1) it involves no legislative or administrative rule-making; and (2) its holding invalidating the class-action waiver is grounded in prior New Jersey law addressing terms of adhesion contracts and the necessity of class actions for vindicating small-value claims. *See* Pet. A22-31 (applying unconscionability test set forth in *Rudbart v. North Jersey Dist. Water Supply Comm'n*, 605 A.2d 681 (N.J. 1992)). Petitioners thus fail to raise a substantial Due Process question of retroactivity meriting review.

Petitioners' Interstate Commerce Clause argument meets the same fate. In support of their argument that the decision below "unduly burdens interstate commerce by seeking to impose disparate requirements on arbitration agreements made in the interstate market" (Pet. 25),

Petitioners cite several of this Court's decisions invalidating state laws that *discriminated* between interstate and intrastate commerce. *See Healy v. The Beer Institute*, 491 U.S. 324, 340-43 (1989) (striking down state statute imposing effective price-limit on interstate beer merchants while exempting purely intrastate merchants); *Best & Co., Inc. v. Maxwell*, 311 U.S. 454, 456-57 (1940) (striking down state law imposing tax on hotel room advertisements by any business that is not a regular retail merchant in the state). The decision below does not conflict with or otherwise implicate these cases. The New Jersey Supreme Court applied a general, non-discriminatory standard of unconscionability based on longstanding state-law principles concerning adhesion and exculpation. In arguing that the differences between this and other states' laws gives rise to a Commerce Clause violation (Pet. 27), Petitioners are challenging not merely the decision below but the very existence of state-law regulation of contracts. None of the cases Petitioners cite comes close to supporting this challenge.

In sum, the second and third questions presented do not deserve serious attention.

CONCLUSION

For all the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

F. PAUL BLAND, JR.
Counsel of Record
PUBLIC JUSTICE, P.C.
1825 K Street, N.W.,
Suite 200
Washington, DC 20036
(202) 797-8600

MICHAEL J. QUIRK
MARK R. CUKER
WILLIAMS CUKER BEREZOFSKY
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002

DONNA SIEGEL MOFFA
TRUJILLO, RODRIGUEZ &
RICHARDS
8 Kings Highway West
Haddonfield, NJ 08033

Counsel for Respondent

Date: March 7, 2007